



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
[www.uspto.gov](http://www.uspto.gov)

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/761,851	01/21/2004	Ken Knoblock	17387	3060

23389 7590 11/30/2005

SCULLY SCOTT MURPHY & PRESSER, PC  
400 GARDEN CITY PLAZA  
SUITE 300  
GARDEN CITY, NY 11530

EXAMINER
----------

PEARSE, ADEPEJU OMOLOLA

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 11/30/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/761,851	<b>Applicant(s)</b> KNOBLOCK ET AL.	
	<b>Examiner</b> Adepeju Pearse	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-36 is/are pending in the application.  
     4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-36 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) The invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-3, 12, 14-17, 24, 26, 31 and 34 are rejected under 35 U.S.C. 102(b) as being anticipated by Ford et al (GB 2 190 822). With regard to claims 1,2, 24 and 34, Ford et al disclose an aqueous beverage with good color stability comprising natural coloring agents such as cochineal (see example 2) with transition metal ions such as iron and copper below 0.1ppm in order to inhibit color fading (page 1 lines 58-63).
3. With regard to claims 3 and 26, Ford et al is silent as to the specific transition metal ions i.e. Cu (II), Fe (III) and Zn (II). However, Ford et al disclose that these ions are common impurities in tap water (page 1 lines 58-60). It is inherent that the transition metal ion encompasses these specific ions because they are common impurities in water.
4. With regard to claim 12, Ford et al disclose that transition metal ions are common impurities in water. It is well known that most beverages comprise water as the aqueous vehicle and therefore comprise the metal ions.

Art Unit: 1761

5. With regard to claims 14-16 and 31, Ford et al disclose that the transition metal ions are present in an amount up to 5ppm, but preferable less than 0.1ppm (page 1 lines 26-29). This range is within applicant's recited range. Ford is silent as to the specific transition metal ion i.e. Cu (II). However, Ford et al disclose that these ions are common impurities in tap water (page 1 lines 58-60). It is inherent that the transition metal ion encompasses this specific ion because they are common impurities in water.
6. With regard to claim 17, Ford et al disclose a beverage comprising citric acid (see examples 1 and 2). It is inherent that the metal ions are dissolved or solvated in this acid.
7. Claims 1-3, 9-10, 12, and 24-26 are rejected under 35 U.S.C. 102(e) as being anticipated by Morello et al (US Pat. No. 6,911,223). With regard to claims 1, 2 and 24, Morello et al disclose a beverage with stability of color and clarity comprising natural color constituents such as cochineal extract (col 2 lines 4-7) and transition metal ions in particular iron, copper, and zinc (col 3 lines 47-48).
8. With regard to claims 3 and 26, transition metal ions are common impurities in water and it is inherent that they encompass Cu (II), Fe (III) and Zn (II).
9. With regard to claims 9-10 and 25, Morello et al disclose that the beverage has a pH in the range of about 3.0 to 5.5. This pH range is acidic and is within applicant's recited range.
10. With regard to claim 12, transition metal ions are common impurities in water. It is well known that most beverages comprise water as the aqueous vehicle and therefore comprise the metal ions.

***Claim Rejections - 35 USC § 103***

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

13. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

14. Claims 4-10, 23, 25, 27-30, 32-33 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ford et al (GB 2 190 822) in view of Takaichi et al (US. Pat. No. 6,630,186). With regard to claims 4 and 27, Ford et al disclose that the beverage may contain other

Art Unit: 1761

ingredients conventionally used in the art (page 1 lines 64-65). However, Ford et al failed to disclose adding water-soluble dietary fiber. Takaichi et al teach a cochineal pigment-containing beverage comprising dietary fibers in specified amounts (col 4 lines 28-29). It would have been obvious to one of ordinary skill in the art to modify Ford et al with Takaichi et al by incorporating dietary fibers for nutritional benefits especially for dietetics (col 4 lines 56-57). In addition, it would be expected that the dietary fiber is water-soluble because it is well known in the art that most beverages comprise water.

15. With regard to claims 5-6 and 28-29, Takaichi et al teach that any known dietary fiber may be added to the beverage such as polydextrose (col 4 lines 44-46). It would have been obvious to one of ordinary skill in the art to modify Ford et al with Takaichi et al with any known dietary fiber for their art recognized function.

16. With regard to claims 7-8 and 30, Takaichi et al teach that the amounts of the dietary fiber could be up to about 1% and 10% per volume of the beverage (col 4 lines 47-49). These amounts are within applicant's recited range.

17. With regard to claims 9-10 and 25, Ford et al is silent as to the solution having an acidic pH. However, Takaichi et al teach that the beverage may be adjusted to a pH of 5 or below. In addition Takaichi et al teach that cochineal pigments are known to have higher stability and show better color tone under acidic conditions (col 4 lines 26-31). It would have been obvious to one of ordinary skill in the art to modify Ford et al with Takaichi et al by utilizing a solution with an acidic pH in order to improve color stability.

18. With regard to claims 23 and 33, Ford et al disclose a color stable beverage comprising cochineal, 0.05% ascorbic acid (see example 2) and up to 5ppm transition metal ions such as

Art Unit: 1761

copper. In addition, Ford et al disclose that the transition metal ions are common impurities in water and should be present preferably at a level below 0.1ppm (page 1 lines 59-63). It would be expected that Cu (II) would be a common impurity in water absent any clear and convincing evidence and/or arguments to the contrary. However, Ford et al failed to disclose polydextrose and specifically Cu (II) ion. Takaichi et al teach beverages containing cochineal colorant at about 1 to about 2mg/100ml of beverage (i.e. about 10 to 20ppm by conversion) (col 2 line 59-62) comprising dietary fiber such as polydextrose up to about 1g and up to about 10g. It would have been obvious to one of ordinary skill in the art to modify Ford et al with Takaichi et al by incorporating dietary fiber for nutritional purposes. It would be expected that the amounts of Cu (II) would be within the recited range in order to improve color stability (see Ford, page 1 lines 60-63).

19. With regard to claim 32, Ford et al disclose that the transition metal ions are common impurities found in water and should be present in an amount up to 5ppm, but preferable less than 0.1ppm in order to prevent color fading (page 1 lines 26-29, 60-63). However, Ford et al failed to disclose dietary fiber. Takaichi et al teach beverages comprising dietary fiber such as polydextrose up to about 1g and up to about 10g; this is within applicant's recited range. It would be obvious to expect that the amount of transition metal per gram of dietary fiber would be as recited by the applicant in order to improve color stability absent any clear and convincing evidence and/or arguments to the contrary.

20. With regard to claim 35, Ford et al disclose an aqueous beverage with good color stability comprising transition metal ions such as iron and copper below 0.1ppm in order to inhibit color fading (page 1 lines 58-63). Ford et al is silent as to the specific transition metal ions i.e. Cu (II),

Art Unit: 1761

Fe (III) and Zn (II). However, Ford et al disclose that these ions are common impurities in tap water (page 1 lines 58-60). It is would be expected that the transition metal ion encompasses these specific ions because they are common impurities in water. However, Ford et al failed to disclose dietary fiber. Takaichi et al teach beverages comprising dietary fiber such as polydextrose up to about 1g and up to about 10g; this is within applicant's recited range. It would be obvious to expect that the amount of transition metal per gram of dietary fiber would be as recited by the applicant in order to improve color stability absent any clear and convincing evidence and/or arguments to the contrary.

#### *Allowable Subject Matter*

21. Claims 11, 13 and 21-22 objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### *Conclusion*

22. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Prior art contains applicable subject matter.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.



Art Unit: 1761

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Peju Pearse  
Art Unit 1761



MILTON I. CANO  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1700